United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 13, 2000

TO : Paul Eggert, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 177-1650
362-6718

SUBJECT: Williams Controls, Inc. 420-1209
Case 36-CA-8732 440-3350-5000
530-4825-5000

UAW Local 492 530-4850-7500
Case 36-CB-2345 530-6067-6001-3740

These cases were submitted for advice on the issue of whether employees referred to the Employer by temporary employee agencies are included in the bargaining unit and covered by the Employer's collective-bargaining agreement with the Union.

FACTS

This case involves employees (TEAES) referred by temporary employment agencies. The Section 8(a)(5) charge alleges, inter alia, that the Employer refused to apply the contract to the TEAES and refused to give the Union relevant information about them. The Section 8(b)(1)(A) charge alleges that the Union improperly sought to apply the contractual union-security clause to them.

The Union has long represented the Employer's production and maintenance employees. The current collective-bargaining agreement runs from September 1997 through August 2002. The unit description includes "all production and maintenance employees of [the Employer's] facility located at..." its plant. Beginning in the early 1990's, the Employer has utilized TEAES to perform entry level unit work. Except for a few TEAES employed for short periods of time during vacations and the Christmas holidays, the practice ceased in late 1998. The practice resumed in March or April 2000. At all times, the TEAES have worked side by side with unit employees under the same orientation, training, direction and supervision. The Employer has stated that "frequently" the TEAES become regular employees

of the Employer.[1] There is no contention that anyone has told the TEAES (except perhaps the Christmas and vacation employees) that their tenure is limited.

The TEAES have been paid collective-bargaining agreement wage rates and have been generally subject to the collective-bargaining agreement. Union representatives have stated that after the expiration of the 30-day grace period, the Union has demanded that TEAES pay dues to the Union and the TEAES have uniformly done so. The working conditions of the TEAES differ from those of the undisputed unit employees in two ways: (1) they are referred and paid by temporary agencies;[2] and (2) the Employer has not withheld Union dues on their behalf.

As noted above, the Employer had few TEAES in 1999. About October 1999, before the 10(b) period, the Employer informed the Union that it wished to cease giving the TEAES medical and dental insurance for the first 90 days of their employment.[3] The Union did not contest that change. About March or April 2000, the Employer resumed the hiring of TEAES on a greater scale. Sometime in May, the Employer's new Human Relations Manager claimed to have learned that the Union was demanding that these employees pay initiation fees and dues. By letter to the Union dated May 23, and titled "Request for clarification regarding dues," the Employer stated its belief that the TEAES were not employees of the Employer and not part of the unit, and that attempts to obtain dues from them violate the Act. In late May and early June, the Union filed grievances in which it claimed a right, based on various clauses in the collective-bargaining

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[1] The current contract between Onsite Commercial Staffing, one of the temporary agencies, and the Employer, par. 5, bars the Employer from hiring any of the employees furnished by Onsite, and provides for liquidated damages if the Employer were to breach the clause. The damages are 30% of the furnished employee's first year salary. However, once the furnished employee completes 90 days of service for the Employer, "any fees or damages specified herein shall be waived."

[2] It is not clear who has administered, as opposed to paid for, their health insurance.

[3] The Employer also said that it was unconcerned about how to determine the seniority dates of the TEAES who would become permanent employees.

agreement, either to dues from the TEAES, or alternatively to have the TEAES barred from performing unit work. These grievances are stalled at stage 5 because of the Employer's refusal to provide information.

By letters dated June 5 to its officers and to the Employer, the Union said it would continue to collect dues "during break and lunch times." By letter dated June 6 to the Employer, the Union requested information with respect to the identity, function, job classification, pay, and hire date of each TEAE. By letters dated June 27 and again on July 11, the Union requested a copy of the contract between the Employer and Onsite Commercial Staffing. By letter dated June 29, the Employer responded that the Employer had used about 200 TEAES since the "mid-1990's," rarely more than 15 at a time, and was currently using 12. As to the 12, it provided their starting dates and wages but not their names or their job classifications (other than the phrase "entry level functions in production"). The June 29 letter declined to produce the contract between the Employer and Onsite Commercial Staffing. Ultimately, on September 21, after obtaining the agreement of the Union that the Employer's provision of the contract to the Union would not constitute precedent, the Employer gave a redacted version of the contract to the Union. The Employer never gave the Union the names of the TEAES.

The agreement with Onsite Commercial Staffing provides that it is the Employer's "responsibility to manage and supervise the work" of the employees supplied to the Employer,[4] and

> OCS shall not be liable for any claims... arising from or in connection with negligent acts or omissions of any [employee it supplies]....[5] [The Employer] agrees to train and/or orient all [employees it supplies] in the same manner as any ... employees [of the Employer].[6]

ACTION

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[4] Par. 6.

[5] Ibid.

[6] Par. 7.

We agree with the Region that complaint should issue, absent settlement, alleging that the Employer, by refusing to apply the contract to the TEAES and by refusing to provide information about them, failed to bargain with the Union in violation of Section 8(a)(5). The 8(b)(1)(A) charge in Case 36-CB-2345 should be dismissed, absent withdrawal, because the TEAES are part of the unit subject to the union-security clause.

In the instant case, the Region has found, and we agree, that the user Employer and the temporary employment agencies are joint employers of the employees supplied by the latter. In M.B. Sturgis, Inc., 331 NLRB No. 173 (August 25, 2000), the Board held that employees supplied by a supplier employer and who are jointly employed by the supplier and a user employer can be part of a single bargaining unit with the user's employees about without the consent of the supplier employer.[7] In initial organization cases, slip op. at 8, the Board reaffirmed that it will apply the "traditional" test for unit placement, i.e., whether the employees supplied by the supplier employer have an adequate community of interest with the employees employed solely by the user employer. The Board has subsequently held that it will apply the same principles to established bargaining relationships where, as here, an employer failed to apply the collective-bargaining agreement between the parties "to temporary employees supplied by... referral agencies performing unit work" at its facility.[8]

By their practice, the parties have included the TEAES in the unit for years. Thus, they work side by side with the other unit employees, and enjoy the starting rates set forth in the contract. Moreover, the Union has subjected those employed longer than the statutory grace period to the union-security clause. After 90 days, many TEAES cease being employees of the joint employer referral agencies and become permanent employees of the user Employer alone. The Employer gave the Union an option of setting TEAES' seniority date as either the first day of work at the

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[7] See also Professional Facilities Management, 332 NLRB No. 40 (Sept. 24, 2000) (petition to represent only the employees of a user employer, all supplied by an alleged joint employer, need not name the supplier employer).

[8] Gourmet Award Foods, Northeast, 332 NLRB No. 24 (Sept. 20, 2000).

facility or the first day of work as an employee of the user Employer alone. As the parties have by their practice included the TEAES in the unit, and as such inclusion does not violate traditional Board policy, the TEAES are part of the unit.[9]

But even if the evidence that the parties had included them in the unit were ambiguous, we would conclude that under traditional representation principles, the TEAES, who work for indefinite periods of time and who share a sufficient community of interest with the other employees of the Employer, are part of the unit.[10] In the factual circumstances here, the TEAES' status appears to resemble that of probationary employees, who are included in a unit even though their tenure is uncertain.[11] Thus, the

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[9] See, e.g., Trident Seafoods, Inc., 318 NLRB 738 (1995), enfd. as modified 101 F.3d 111 (D.C. Cir 1996) (as to unit scope, compelling circumstances are necessary to overcome the significance of a bargaining history), and cases cited therein; Townley Metal & Hardware Co., 151 NLRB 706, 708-709 (1965) (long bargaining history in a unit of warehouse employees and office clericals sufficient to overcome usual Board reluctance to direct election in such a unit).

[10] See, e.g., Continental Winding Co., 305 NLRB 122, 123-24 (1991) (test for inclusion of employees referred by supplier employer was normal test of whether they were regular part time employees or casual employees); Personal Products Corporation, 114 NLRB 959, 960 (1955) (employee hired as a temporary but who worked 6 hours per day for 6 months was an eligible voter because his tenure was uncertain); Houston Building Service, 296 NLRB 808, n.2 (1989), enfd. 936 F.2d 178 (5th Cir. 1991), cert. denied 502 U.S. 1090 (1992) (Board included employees claimed to be temporary but who were not so told); Garney Morris, Inc., 313 NLRB 101, 120-121 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995) (employee Panariello, who was hired with the understanding that he would work as long as work was available, included in unit).

[11] See generally Westlake Plastics Co., 119 NLRB 1434, 1436 (1958) (probationary employees eligible to vote although parties stipulated to exclude them from eligibility because Board policy so strongly favors inclusion); The Sheffield Corporation, 123 NLRB 1454, 1457 (1959) (include probationary employees in unit although retention depends on suitability); Quality Chemical, Inc., 324 NLRB 328, 329, 331 (1997) (Regional Director included in the unit temporary

Employer's refusal to apply the contract to the TEAES as unit employees violated Section 8(a)(5).[12]

In addition, the Employer, by refusing to supply information about the TEAES, violated the Act without regard to whether the TEAES were part of the unit because the information was relevant to the policing of the contract.[13] Finally, since the TEAES are part of the unit covered by the contract, the Union's collection of dues under the union-security clause is lawful, and the Section 8(b)(1)(A) charge should be dismissed, absent withdrawal.

B.J.K.

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employees who were essentially newly hired probationary employees and who became, after 90 days, regular full time employees; issue not raised in request to the Board for review).

[12] We note that there is a Section 8(a)(5) allegation that the Employer unlawfully unilaterally subcontracted unit work to the TEAES. [*FOIA Exemptions 2 and 5*

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[13] United Graphics, 281 NLRB 463, 465 (1986).